Supreme Court, U. S.
FILED
MAR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1199

TIMES-PICAYUNE PUBLISHING COMPANY,
Petitioner,

versus

JOEL I. FORREST,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

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INDEX

Page

Response to Questions Presented 2

Conclusion 8

Proof of Service 9

Appendix A 11

TABLE OF CASES

Page

Adey v. United Action for Animals, 361 F.Supp. 451 (S.D.N.Y. 1973) 6

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 3, 5

Green Belt Coop. Assn. v. Bressler, 398 U.S. 6 (1970) 6

Hutchinson v. Proxmire, 431 F.Supp. 1131 (W.D.Wisc., 1977) 6

Martin Marietta Corp. v. Evening Star Newspaper, 417 F.Supp. 947 (D.D.C. 1976) 6

Rosenblatt v. Baer, 388 U.S. 75 (1966) 3

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 5

St. Amant v. Thompson, 390 U.S. 727 (1968) 7

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 6

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Respondent, Joel I. Forrest, respectfully submits that a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeal, First Circuit, State of Louisiana, entered herein on June 13, 1977 and reported at 347 So.2d 1255 for the reasons hereinafter set forth.

The opinion of the Court of Appeal, First Circuit, State of Louisiana, entitled "Joel I. Forrest v. Times-Picayune Publishing Company" 347 So.2d 1255 (1977) clearly sets forth the facts involved and disposes of the legal issues and appears in Appendix A hereto, infra. p. 8. Suit was initially instituted against the investigative reporter, Bill Lynch, and the pub-

lisher, Times-Picayune Publishing Corporation. However, suit was properly dismissed as to the investigative reporter and no appeal was perfected from this judgment. Consequently, the only party involved on appeal was Times-Picayune Publishing Corporation.

RESPONSE TO QUESTIONS PRESENTED

1. Is an engineer who prepares specifications for a multi-million dollar state building a "public figure" or a "public official" for purposes of a newspaper article reporting a state authority's preliminary determination that the engineer has drawn proprietary specifications that are potentially unlawful?

The news article at issue herein was based on a letter of January 25, 1973, quoted in full in the decision of the Court of Appeal, First Circuit, State of Louisiana, and the letter clearly reflects that it contains many qualifications. The letter refers to "somewhat proprietory (sic)" and makes no indication of anything being "closed" and as set forth in the decision complained of by applicant, the use of "proprietary" or "closed" specifications are not necessarily illegal, whereas, the use of the term "rigged" in the headline to the news article leaves no doubt in the mind of the average reader as to the methods being conveyed by the publisher. Accordingly, applicant's argument about "proprietary" and "closed" specifications being synonymous is of no significance to a determination of the issues inasmuch as both are completely legal under certain facts and circumstances. Additionally, the letter which is the basis of the news article involved qualified the term "proprietary" by utilizing "somewhat proprietary." Further, the plans and specifications on the particular project involved clearly specified that "equals or better" would be accepted and that reference to a brand name was solely for the purpose of designating quality.

By utilizing such an argument, counsel for applicant is attempting to create a "public controversy" in which to thrust respondent. The facts of this case clearly reflect that Joel I. Forrest is a private consulting engineer; has never held public office nor has he been a candidate for public office; and, has not become involved in anything which would make him newsworthy. In this instance, he contracted with an architect, August Perez, and had no direct relationship with the governmental agency.

Prior to trial on the merits, counsel for Times-Picayune Publishing Company moved for summary judgment which was denied by the Trial Court, However, it should be noted that the motion for summary judgment was not timely filed inasmuch as it was filed several days prior to the trial on the merits was scheduled and did not allow the necessary statutory ten day delay for a response prior to a hearing on the motion. The motion for summary judgment raised the issue as to whether respondent was a "public official" or "public figure" and in this application, petitioner has apparently abandoned any contention that respondent was a "public official" although weakly stating that there is precedence for treating respondent as a public official under the decision of *Rosenblatt v. Baer*, 388 U.S. 75 (1966).

Primarily, petitioner now complains that respondent is a "public figure" as defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). We submit that a reading of *Gertz* does not substantiate such a conclusion.

As we appreciate the opinion in *Gertz*, the Court seems to recognize three categories of public figures. The first classification includes persons who, by "occupy(ing) positions of such persuasive power and influence,"[1] or by their "pervasive

1. Gertz, 418 U.S. 323, 345.

involvement in the affairs of society,"[2] or by the "notoriety of their achievements"[3] have achieved "general fame or notoriety in the community."[4]

It would appear from the Court's observation to the effect "We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes"[5] makes it unlikely that many persons would fall into the first category. Commenting further, the Court observed, "More commonly, those classed as public figures have thrust themselves to the forefront of particular **public controversies** in order to influence the resolution of the issues involved."[6] (Emphasis supplied.) Continuing, the Court stated that where "an individual voluntarily injects himself or is drawn into a particular public controversy (he) thereby becomes a public figure for a limited range of issues."[7] With reference to this category of public figures, the Court stated, "(i)t is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in a particular controversy giving rise to the defamation."[8]

As a guideline on how to evaluate the "nature and extent" of an individual's involvement in a public controversy, the Court suggested several factors to consider: Whether the individual sought out and discussed the issue with the press; whether he "thrust himself into the vortex of (the) public issue"; and whether he otherwise "engage(d) the public's attention in an attempt to influence its outcome."[9]

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2. Id. at 352.
3. Id. at 342.
4. Id. at 351-52.
5. Id. at 352.
6. Id. at 345.
7. Id. at 351.
8. Id. at 352.
9. Id.

Gertz further suggests that perhaps an individual might become an involuntary public figure, or at least that is our interpretation, particularly the language: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."[10]

Apparently, in this instance, it is the contention of petitioner that respondent falls into the second category of the defamed individual who has voluntarily participated in a particular public controversy. However, counsel for petitioner speaks of matters of "public interest" but has not at any time contended nor do they set forth facts to substantiate that a "public controversy" existed or that respondent had voluntarily participated in the same in an effort to resolve the controversy.

We submit that counsel for petitioner is confusing "involvement in a matter of public concern" with voluntary "participation in a public controversy" and while the concepts may be somewhat related, *Gertz* nevertheless requires voluntary participation "in a public controversy" as compared to involvement in a matter of "public concern", overruling *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

It thus appears from *Gertz* that once a public controversy is established there must be an additional examination to determine the nature and extent of plaintiff's participation in the controversy before he can be classified a public figure.

In this instance, petitioners have not established that a public controversy existed and the only connection with the matter of "public concern or interest" was indirect through the architect and the respondent had no contractual relationship with the government or any government agency.

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10. Id. at 345.

Counsel for petitioner concludes that *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) bears no resemblance to the facts of the instant case and admittedly this observation is correct. The Court, in *Firestone*, concluded that Mary Alice Firestone was not a "public figure" since she did not occupy "(a) role" of "especial prominence in the affairs of society,' and that she had not been "thrust to the forefront of particular public controversies in order to influence the resolution of the issues involved." To this extent, counsel for respondent agrees with counsel for petitioner, however, *Time, Inc. v. Firestone*, supra, contains language pertinent to the issues at hand and particularly that observation to the effect that there was never any findings made by the divorce court that Mary Alice Firestone was guilty of adultery although *Time, Inc.* contended that it faithfully reproduced the **precise** meaning of the divorce judgment. In this instance, the Trial Court and intermediate Appellate Court, has concluded that, under Louisiana law, the terms "proprietary" and "closed" specifications are not synonymous nor was the word "rigged" synonymous with the word "proprietary", consequently, the headline "rigged" did not convey the precise meaning of the news article.

Petitioner contends that the Court of Appeal, First Circuit, State of Louisiana, committed error and cited no authority for its conclusion that respondent was not a public figure and cited the following District Court decisions: *Hutchinson v. Proxmire*, 431 F.Supp. 1131 (W.D.Wisc., 1977); *Adey v. United Action for Animals*, 361 F.Supp. 451 (S.D.N.Y. 1973) aff'd, 493 F.2d 1397 (2d Cir.); cert. denied, 419 U.S. 842 (1974); *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F.Supp. 947 (D.D.C. 1976); and *Green Belt Coop. Assn. v. Bresler*, 398 U.S. 6 (1970). *Adey* and *Green Belt Coop. Assn.* are pre-*Gertz* decisions and the facts of all four cited cases clearly distinguishes them from the facts of the instant case.

Accordingly, we respectfully submit that the Trial Court and the Court of Appeal, First Circuit, State of Louisiana, correctly concluded that respondent was not a public official nor a public figure.

2. Absent any showing of actual malice, may a newspaper that reports a state authority's preliminary determination that specifications for a state building are proprietary and potentially unlawful be required to respond in damages for libelling the engineer who prepared the specifications?

Petitioner did not argue this question and presents nothing for respondent to oppose. Briefly, respondent admits that a newspaper report of a state authority's preliminary determination, if fairly and accurately reported, would not and does not subject the newspaper to the possibility of responding in damages if not otherwise objectionable. The opinion of the Court of Appeal, First Circuit, State of Louisiana, clearly reflects that the caption or headline to the news article in question utilized the term "rigged" on the first page and on the continuation of the story on page six of the same newspaper, they used the term "questioned." The only reason advanced for using the term "rigged" on the front page as compared to "questioned" on page six was the lack of space. This may be an excuse on the part of the publisher for using the offensive language "rigged" but certainly is not justification in law. Additionally, we submit that knowingly utilizing the language in the headline, which was totally unsupported by the published article, would and should constitute actual malice according to the guidelines set forth in *St. Amant v. Thompson*, 390 U.S. 727 (1968). Particularly, we direct the Court's attention to the language in *St. Amant*:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true.

> The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unvertfied anonymous phone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would ever put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report." St. Amant v. Thompson as 732.

Petitioner should not be permitted to contend that the word "rigged" was utilized in good faith when the story accompanying the headline does not substantiate anything illegal and when the continuation of the story allows more space, the headline reads "questioned", a completely unobjectionable word.

CONCLUSION

We respectfully submit that a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeal, First Circuit, State of Louisiana.

Respectfully submitted,

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PROOF OF SERVICE

I, ROBERT L. KLEINPETER, Attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of March, 1978, I served three copies of the foregoing opposition to the petition for a writ of certiorari on petitioner) Times-Picayune Publishing Corporation, by mailing the same through the United States mail to counsel of record, Mr. Frank W. Middleton, Jr., P. O. Box 2471, Baton Rouge, Louisiana, first class, postage prepaid.

All parties required to be served with copies of this opposition have been served.

March 23, 1978.

Robert L. Kleinpeter

APPENDIX A

JOEL I. FORREST

Plaintiff-Appellee

versus

BILL LYNCH AND TIMES-PICAYUNE PUBLISHING COMPANY

Defendant-Appellant

Court of Appeal, First Circuit, State of Louisiana
Number 11,361

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE, HONORABLE DANIEL W. LEBLANC, JUDGE, PRESIDING

BEFORE: SARTAIN, COVINGTON AND LOTTINGER, JJ.

SARTAIN, J.

June 13, 1977

This is a defamation suit arising out of an article that appeared on January 26, 1973 in the States Item, a newspaper of general circulation in the New Orleans area.

Plaintiff, Joel I. Forrest (appellee) is a consulting electrical engineer. He was engaged by the architect to prepare plans and specifications, including bid specifications, for the television-sound system for the Louisiana State School for the Deaf, Baton Rouge, Louisiana.

The article itself was written by Bill Lynch. The headline attending the article was prepared by an unidentified staff member of the owner-publisher, Times Picayune Publishing Company (appellant).

Appellee named as defendants the author, Lynch, and the appellant publisher. The trial judge rendered judgment in favor of appellee and against the publisher only, absolving the author of any liability. We affirm.

The facts are not in dispute. The taking of bids and related matters are under the supervision of the State Bond and Building Commission, Bob Baskin, Director. However, the law requires the prior approval of the Louisiana Educational Television Authority (LETA) on that portion of the project relating to the communication system. Robert D. Blazier and Max Fetty are the Educational Television Engineer and Executive Director, respectively, of LETA.

On the Tuesday preceding the Monday on which the bids were to be taken, the plans and specifications pertaining to the communication system were submitted to Blazier and Fetty. On the intervening Thursday, January 25, 1973, Blazier and Fetty addressed a letter to Baskin, which in pertinent part stated:

> "After reviewing the specifications for the communication system for the Louisiana State School for the Deaf in Baton Rouge, I must commend the writer for the use of very innovative television technology. The functions described in these specifications require sophisticated interconnection and planning.
>
> "In order to properly evaluate the true quality of these specifications, it will be necessary that one-line functional drawings be provided. It is incumbent upon us to determine that the system as specified will function in accordance with the desires of the School for the Deaf. **The nature of these specifications seem somewhat proprietory (sic) to certain manufacturers.** Nonetheless, it is our desire to have specifications that all responsible bidders can bid with impunity. In evaluating these specifications, it would assist us greatly to have manufacturers specifications sheets for each of the major electronic devices. * * *" (Emphasis ours)

Bill Lynch, capital correspondent for appellant, was given a copy of the letter. The subject article was then written and transmitted to appellant for publication. It appeared in appellant's paper on the following day, Friday, January 26, 1973.

The lead paragraph set the general tenor of the article:

> "BATON ROUGE—Specifications for an expensive television-sound system for the new school for the deaf scheduled for bidding Monday appear to be proprietary, officials of the Louisiana Educational Television Authority today advised the State Bond Commission. * * *"

The above portions of the letter of January 26, 1973, are also quoted in their entirety. With respect to appellee the article stated:

> "* * * The school is being designed by the architectural firm of August Perez and Associates of New Orleans and the electrical engineering is by Joel Forrest of Baton Rouge. * * *"

However, the headline of the article stated:

"BID SPECS REPORTED 'RIGGED'"

The article was placed on page one of the paper and was continued to page six. The headline for the continued portion of the article read:

"Bid Specs Questioned"

The record reflects that on the evening of January 25, 1975, Forrest met with Blazier and it was determined that the bid specifications were in order and were therefore ap-

provd by LETA as prepared. However, Lynch was not informed of the approval or of the letter of January 26, 1973 confirming such approval.

Appellee originally objected to and claimed to be defamed by both the article itself and the headline. However, his emphasis on appeal, in brief and oral argument, is really directed to the headline and the use of the word "rigged." The trial judge, and we agree, found nothing objectionable about the article itself. The author, Lynch, reported no more than the legitimate concern of LETA and the possibility of preferential treatment given the certain manufacturers, i.e., proprietary. There has been no appeal from that portion of the judgment dismissing appellee's suit against Lynch. Accordingly, the dispute now centers around the article and the headline and appellee's claims against and the defenses raised by appellant.

Appellant argues that the trial judge erred (1) in holding that in the context of the news article the use of the word " 'rigged' " in the headline gave rise to an action in defamation; (2) in refusing to hold that appellee was a "public official" or "public figure," thereby requiring proof by clear and convincing evidence that the publication was made with knowledge of its falsity or a high degree of awareness of its probable falsity; (3) in holding that the use of the word " 'rigged' " constituted fault under C.C. Art. 2315, and (4) in assessing excessive damages.

Appellant's first assignment of error is based on the well established rule that truth or substantial truth is a defense to an action in defamation. *Rosen v. Capital City Press*, 314 So.2d 511 (La. App. 1st Cir. 1975). Further, that R.S. 38:-2290-2296 prohobits closed specifications in public bidding. In this connection, appellant argues that the entire article, including the headline, must be viewed as a whole in determining whether any libel has been committed, *Mulina v. Item Co., Inc.*, 217 La. 842, 47 So.2d 560 (1950); that the article is based on the letter (January 25, 1973) which raised the question of improper, perhaps illegal, conduct; and, in this context, that the headline connotes no more or less than that which is actually stated in the letter and would certainly be so understood by the everyday reader. Thus, appellant claims that an examination of the entire story, including the headline, clearly shows that the word "rigged" was used as a synonym of or paraphrase for "proprietary" or "closed" specifications, and that the headline was true or at the least, substantially true. This argument must be rejected.

We do not construe the word "rigged"[1] as being synonymous with the word "proprietary,"[2] particularly when it is used in the sense that illegality is inferred. The proprietary interest called to attention in the article may or may not be illegal, improper or otherwise questionable. However, the use of the word "rigged" leaves little doubt as to its import and brands the activity of appellee as fraudulent, illegal and improper. Whereas one not particularly versed in or blessed with a superior knowledge of word meanings might attach some improper motive to the proprietary inquiry contained in the letter, the word "rigged" dispels any doubt. The average, everyday individual does his talking, listening, reading, and writing without constant reference to an unabridged dictionary.

Appellant's second assignment of error pertains to the failure of the trial judge to hold that appellee is a public official or public figure so as to require a finding of malice on the part of the author or the publisher. The appellee is neither

1. Webster's Third New International Dictionary defines "rigged" as "a fraudulent or a cheating trick."
2. Ibid., defines "proprietary" as "made and marketed by person or persons having the exclusive right to manufacture and sell."

a public official nor a public figure under the holdings in New York Times Company v. Sullivan, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) or *Gertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974).

The designation of "public official" applies, at a minimum, to those persons employed by a public or governmental body who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs. *Rosenblatt v. Baer*, 383 U.S. 75, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966). Appellee does not fall within the above category. He is a private consulting engineer who was hired by the architect. While he was responsible for the plans and specifications of the subject communications system, he was nonetheless totally accountable only to the architect. The eventual expenditure of public funds on the proposed building does not in itself make appellee a public official.

A person not a public official, who voluntarily injects himself or who is drawn into a particular public controversy becomes a public figure as regards that controversy and assumes a special prominence in the resolution of the controversy. In such a case the same rules apply to a public figure as apply to a public official. *Gertz v. Welch*, above. In such cases, malice or a total disregard as to the probable falsity of the objectionable material is required. Again, appellee does not fall within that class of persons deemed to be a public figure.

Appellant's third contention is that the trial judge erred in holding that the use of the word "rigged" constituted fault under the law of Louisiana so as to impose liability. We find the case of *Wilson v. Capital City Press*, 315 So.2d 393 (La. App. 3rd Cir. 1975), writ denied 320 So.2d 203 (1975), to be in point. There (315 So. 2d 393, 397) the court stated:

> "Under the mandate of *Gertz v. Robert Welch, Inc.*, supra, a publisher may be held liable for defamatory falsehood only if there is some fault on his part. The Supreme Court did not hold that the printing of an untruth would itself constitute fault. There must be some culpability on the part of the publisher. (Emphasis ours)

The same rationale was followed in *LeBouef v. Times Picayune Publishing Corporation*, 327 So.2d 430 (La. App. 4th Cir. 1976). In each of these cases an error in identification was made by a law enforcement agency. There was no independent acts of culpability on the part of the defendants. In essence, the courts held that the reporters there concerned were not at fault when they failed to seek additional vertfication before publishing the names of persons given to them as having been arrested. In the case at bar, the facts are quite dissimilar. Here the use of the libelous term "rigged" was solely the act of an unidentified copy editor of the appellant-publisher. It was a poor and erroneous choice of words and, in our opinion, constitutes fault. C.C. Art. 2315.

Lastly, appellant argues that the award of $10,000.00 is grossly excessive ". . . in the absence of any evidence of more than temporary irritation and slight embarrassment." Appellee, while admitting that the article caused him some aggravation, testified that he had never been involved in any type of controversy, had always endeavored to practice his profession in keeping with proper ethics, and had always sought to abide by the law. Additionally, appellee claimed that he had received no state-associated work between the date of the article and the trial of this cause, a period in excess of three years. Under these circumstances, we are not disposed to hold that the trial judge abused the great discretion accorded him in such matters. C.C. Art. 1934(3).

Accordingly, for the above reasons, the judgment of the district court is affirmed at appellant's costs.

AFFIRMED.